his ability. The procedure to be adopted must be fair to all those who have an interest in the inquiry whether they are represented or not. What is a fair procedure to be followed will depend upon the nature of the claims, the constitution of the inquiry and of the parties involved and other circumstances of the case.

The above observation is a general one. General, in my view, it has to be on account of the lack of specific point in issue by reason of the order that has been made in this appeal, and also because the rules of natural justice vary infinitely (see *R v. Secretary of State for the Home Department, ex Parte Santillo, supra,* per Lord Denning MR) and the requirements of natural justice depend on the circumstances and the factual situations of each particular case.

CHUAN SENG SDN. BHD.

v.

OOI BOON LAI & 2 ORS.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 22-63-87]
18 APRIL 1993

LANDLORD & TENANT: Defendants co-owners of property - Plaintiff in occupation - Plaintiff claiming existence of tenancy - Ground tenants - Defendants disputing claim - Whether there was a tenancy coupled with an equity - Whether plaintiff was a mere licensee.

EVIDENCE: Claim of tenancy coupled with equity - Burden of proof - On whom does it lie - Non-production of material witness - Whether adverse inference to be drawn - Section 114(g) Evidence Act 1950.

The plaintiff company claimed to be the ground tenant of premises co-owned by the three defendants. The defendants disputed the plaintiff's claim on the grounds that the plaintiff was a mere licensee and served a notice to quit requiring delivery up of vacant possession of the land on which the premises stood within one month from the date stated in the notice.

The plaintiff prayed for a declaration that the defendants were not entitled to enter the area of the premises and for an injunction to restrain the defendants and their servants or agents from entering the area of the premises. The plaintiff also claimed damages for trespass.

Held:

[1] It was not disputed that the three defendants are the registered owners of the land which comprises the premises which PW1 and some others occupy. While the plaintiff claims to be a ground tenant, it admits the title of the defendants. It sets up a title derived from the three defendants and the burden of proof was on the plaintiff to show the tenancy.

[2] The evidence shows that only PW1's father and later PW1 herself were the ground tenants of the said premises until 1979 when the land was transferred. It was unlikely that PW1 had paid ground rentals to the transferee on behalf of herself or on behalf of the

plaintiff. If the plaintiff had paid ground rental at any time that would have been reflected in the company's accounts but no documentary evidence was produced to reflect that.

[3] If indeed ground rent was at all paid after the land was transferred, the transferee would have been the best person to say that he received ground rentals in respect of the premises and that it was the plaintiff company that paid the rentals but he was not called to give evidence on behalf of the defendant. The inference to be drawn under s. 114(g) of the Evidence Act 1950 was that the evidence which would have been and was not produced would if produced have been unfavourable to the plaintiff company which witheld it.

[4] There was absolutely no evidence showing that the plaintiff company was or had become a ground tenant of the transferee during or after the period of the transfer or of the transferee's successors-in-title of the said land after that period.

[Plaintiff's claim dismissed. Defendants counterclaim allowed. Costs to the defendants].

Cases referred to:
Portland Management v. Harte & Ors. [1976] 1 All ER 225 ***(foll)***
Delaney v. T P Smith Ltd. [1946] 2 All ER 23 / [1946] KB 393 ***(foll)***
Ryan v. Clark [1849] 14 QB 65 at 71 ***(refd)***
Mok Deng Chee v. Yap See Hoi & Ors. [1981] 2 MLJ 321 / [1981] 1 CLJ 124 ***(refd)***
Muniandy & Anor. v. Muhammad Abdul Kader & Ors. [1989] 2 MLJ 416 / [1989] 2 CLJ 577 ***(refd)***

Legislation referred to:
Control of Rent Act 1966
Evidence Act 1950, ss. 73A, 114(g)

For the plaintiff - Khoo Soo Eng; M/s. Khoo Soo Eng & Co.
For the defendants - S.P. Annamalai; M/s. Annamalai & Co.

JUDGMENT

K.C. Vohrah J:
The three defendants became registered co-owners of a piece of land comprised in Grant No. 37680 Portion 469 of the Mukim of Kubang Pasu (the said land) in 1980 and 1981. The said land has a building on it and the building and the immediate area adjoining the house are known as premises No. 5.B, Pekan Padang Sera.

In the building on the said premises live one of the shareholders and director of the company, PW1, her husband and a relative. There are other persons who are not related to PW1 or her family who also live there. The plaintiff company claims to be the ground tenant in possession of these premises.

The three defendants dispute that the plaintiff company is a ground tenant of the premises and on 17 May 1987 they, through their then solicitors, sent a notice to the plaintiff company stating that it was a licensee of the premises and requesting it to deliver up vacant possession of the land on which the building stood within one month from the date stated in the notice.

It is not disputed that shortly after the notice, in June 1987, the plaintiffs, through their agents and servants, started clearing the said land and the area surrounding the said premises.

In October 1987 the plaintiff filed a writ. In its statement of claim the plaintiff prays for:

i) a declaration that the defendants are not entitled to enter the area of the premises,
ii) an injunction to restrain the defendants and their servants or agents from entering the area,
iii) damages for trespass and
iv) special damages for damage to the fencing around the said premises and to an old car.

The claim for special damages has now been abandoned. In 1993 the statement of claim was amended to include a new prayer for a declaration that the plaintiff's tenancy on the said piece of land is coupled with an equity which cannot be terminated save with just and adequate compensation. In the reply to the counterclaim of the defendants the plaintiff also claims that the plaintiff is a protected tenant under the Control of Rent Act 1966.

The defendants aver that the plaintiff was never at any material time a ground tenant of the defendants and that the plaintiff had never at any material time attorned tenancy to the defendants or paid any rental to them. The defendants say that the plaintiff had been in occupation of the premises without the prior knowledge or consent of the defendants' predecessor in title and that on the expiry of the notice dated 17 May 1987

terminating the licence of the plaintiff company to occupy the said premises the plaintiff company became a trespasser and continues to be a trespasser.

The defendants also counterclaim for an order of delivery of vacant possession of the said premises and for damages arising out of the plaintiff's trespass which they claim deprived them of the use and enjoyment of the said land for a housing project. The plaintiff joins issue with the defendants in their defence.

In *Portland Management v. Harte and Others* [1976] 1 All ER 225 Scarman LJ at page 230 dealt with the legal position as between an owner and another in possession of the owner's land thus:

> The position as between an owner and another in possession of the land of the owner has been considered in fairly recent times by the Court of Appeal in *Delaney v. T P Smith Ltd.* [1946] 2 All ER 23, [1946] KB 393. I need not refer to the facts of that case, but there are two passages from the judgments which indicate the law as I understand it to be. Tucker LJ said [1946] 2 All ER at 24, 25, [1946] KB at 397:
>
> > It is clear that the plaintiff was in fact founding his claim on the tenancy agreement pleaded by him. It is no doubt true that a plaintiff in an action of trespass to land need only in the first instance allege possession. This is sufficient to support his action against a wrongdoer, but is not sufficient as against the lawful owner, and in an action against the freeholder the plaintiff must at some stage of the pleadings set up a title derived from the defendant ... It is sufficient, I think, to refer to the judgment of Patteson J, in *Ryan v. Clark* [1849] 14 QB 65 at 71 where he explained the nature of this plea as follows: '... it admits such a possession as would maintain the action against a wrongdoer, but asserts a freehold in the defendant with a right to the immediate possession'.
>
> Wynn-Parry J took the same view. He said [1946] 2 All ER at 26, [1946] KB at 400:
>
> > So where a plaintiff by his reply admits the title of the defendant, but pleads a demise from him, there is a true confession and avoidance. The plaintiff is concluded by his confession and must fail in his action unless he proves the case set up by his reply, namely, a demise from the defendants.

Scarman LJ commented on the above passages and showed where the burden of proof lies:

> Now, it is true that the parties are the other way round in the present case; but the principle of the law is plain. If the case of the person in possession, is, or has to be, that the other side is the owner and that his title derives from a tenancy which the other side has to recognise, then this is confession and avoidance, and the burden of proof is on the party setting up the tenancy.

In our case it is not disputed that the three defendants are the registered owners of the said land which comprises the premises which PW1 and some others occupy. While the plaintiff claims to be a ground tenant it admits the title of the defendants. It sets up a title derived from the three defendants and the burden of proof is therefore on the plaintiff to show the tenancy.

As to the history of the premises and the alleged tenancy one has to take into account the statutory declaration of one Ooi Chye Kee (now deceased) made on 5 December 1987 and which I consider as admissible under s. 73A of the Evidence Act 1950 and the evidence of PW1.

First the statutory declaration. The relevant portion of the statutory declaration of Ooi Chye Kee reads -

1. I was the original Owner of the land comprised in Grant No. 37680, Portion 469, Mukim Kubang Pasu when the Land Title was issued by the Kedah State Government in the Muslim year of 1346.
2. This piece of land was transferred by me to my son, Ooi Tean Hui on 17 March 1979 as a gift in consideration of love and affection.
3. The premises which is now known as premises No. 5-B, Pekan Padang Sera was erected sometime in 1936 with my consent and permission as the registered Owner of the piece of land known as Grant No. 37680, Portion 469, Mukim Kubang Pasu.
4. I had also collected ground rent from Mr. Saw Bah Gaik and later Madam Saw Hong Toon for the portion of the said land on which the said premises was erected and the surrounding compound which was fenced.
5. When I was the registered Owner of the said land, I always recognised Mr. Saw Bah Gaik and later Md Saw Hong Toon as my tenant for the said portion as mentioned in the earlier paragraphs of this statutory declaration.

It will be noted that the statement of the late Ooi Chye Kee is to the effect that the premises (used in the context of the statement, it means the building) was erected in 1936 by PW1's father with Ooi Chye Kee's consent and that Ooi Chye Kee collected ground rentals from PW1's father and later from PW1 and that he recognised PW1's father and later PW1 as his tenant for the premises. It will be noticed that the plaintiff company is not mentioned at all in the statutory declaration.

I now go to the evidence of PW1. The evidence that PW1 gave was generally vague. She said that the building on the said premises was erected some 50 years ago. According to the statement of the late Ooi Chye Kee it was built in 1936. PW1 stated that she had lived in a house opposite the said premises and that she lived in the disputed premises some 20 years ago meaning that sometime in the late 1960s or the early 1970s she shifted from the house opposite into the said premises. My understanding of her evidence is that the building on the said premises had been used as a store for goods and was from the time she moved into it then used for human habitation.

From a sight of a copy of the title deed to the land it is clear that the land was transferred from Ooi Chye Kee to Ooi Tean Hui on 17 March 1979 (see Exhibit B, Folio 1) coinciding with what the late Ooi Chye Kee stated in his statutory declaration. The land was purchased by the 1st defendant and two others on 7 February 1980. According to PW1, before the plaintiff company was incorporated (and it was incorporated in 1967), it was her father who paid the ground rental of RM120 a year to Ooi Chye Kee. She said that after the plaintiff company was incorporated she handled the ground rental. Presumably she paid the rental to Ooi Chye Kee from 1976 (the time the company was incorporated) to 17 March 1979 when the property was transferred to Ooi Tean Hui. Now, it is a fact in issue whether ground rentals were paid by the said company. One would expect receipts to show that the rentals had been paid but not a single receipt was produced. As to this PW1 explained that no receipts were issued because the parties were relatives. But surely the accounts of the company would show that such rentals were indeed paid from 1976 to 1980. No evidence to that effect was produced. I doubt her evidence. It will also be remembered as pointed out earlier that she had stated that after the company was incorporated she handled the rentals. However, when questioned about the receipts in relation to the company's accounts she changed her story and said the rentals were paid by her late father (he died in 1989) and not by the company. She was far from being truthful.

The evidence only shows that PW1's father and later PW1 herself were ground tenants of the said premises until 17 March 1979 when Ooi Chye Kee transferred the said land to Ooi Tean Hui. It will be remembered Ooi Chye Kee declared "When I was registered Owner of the said land I always recognised Mr. Saw Bak Gaik (PW's father) and later Md Saw Hong Toon (PW1) as my tenant ...". The plaintiff company had already been incorporated in 1976 but in Ooi Chye Kee's statutory declaration it was nowhere ever stated that the defendant company was a ground tenant of his. And there is no evidence that after the transfer of the land on 17 March 1979 to Ooi Tean Hui that the plaintiff company became the ground tenant of Ooi Tean Hui. It will be noted that PW1 claimed that she paid rentals up to 1981 (although as pointed out earlier she later said her father paid the rentals for the company) but the land was sold by Ooi to the 1st defendant and 2 others on 7 February 1980 and that cannot be true.

The 1st defendant gave evidence that the plaintiff did not pay any rentals to him and that there was no offer to pay rental to him. PW1 admitted she did not pay ground rentals to the new owners. She said the correct owner of the land was not known. I found the evidence of PW1 hard to believe because if the plaintiff or she had ever paid rentals to the defendants' predecessor in title they could have easily found out who the new owners were.

My view is that it is unlikely PW1 paid ground rentals to Ooi Tean Hui on behalf of herself let alone on behalf of the said company. And as I have observed earlier if the company had paid ground rental at any time that would have been reflected in the company's accounts but no documentary evidence was produced to reflect that. In any event if indeed ground rental was at all paid after the land was transferred to Ooi Tean Hui, Ooi Tean Hui would have been the best person to say he received ground rentals in respect of the premises and that it was

the plaintiff company that paid the rentals but he was not called to give evidence on behalf of the plaintiff. The inference to be drawn under illustration (g) of s. 114 of the Evidence Act 1950 is that the evidence which could have been and was not produced would if produced have been unfavourable to the plaintiff company which withheld it.

While there might be some evidence of a relationship of landlord and ground tenant in respect of Ooi Chye Kee on the one hand and PW1's father and later PW1 herself on the other hand from 1936 to 17 March 1979 when Ooi Chye Kee transferred his land to Ooi Tean Hui there was absolutely no evidence showing the plaintiff company was or had become a ground tenant of Ooi Chye Kee during that period or of the successors-in-title of the said land after that period. Though there is evidence that for the purposes of assessment the plaintiff company was registered as owner of the premises with Majlis Daerah Kerajaan Tempatan, Kubang Pasu, Jitra, Kedah from 1984 that date, as can be clearly seen, is well after the defendants had become owners of the said land.

From an examination of the evidence before me it is clear that PW1 wanted to be compensated to move out of the premises. Although she denied knowing the 1st defendant, DW1's evidence was that he had met her and had negotiated with her on the compensation but no settlement could be reached. It is probable that was what had happened and that PW1 is claiming that the plaintiff company (of which she is a shareholder and a director) is ground tenant of the defendants' predecessors in title in order to claim compensation. In my view the plaintiff company has not discharged the burden of proving that it ever was a ground tenant of the defendants or the defendants' predecessors in title. The plaintiff was at best a licensee of the defendants and the notice served on 17 May 1987 terminating the licence is a valid notice. The plaintiff's claim for a declaration that there was trespass must necessarily fail. As no tenancy has been made out the issue of a tenancy coupled with equity does not arise. Nor does the issue of the protection of the premises under the Control of Rent Act arise since, again, no tenancy has been made out and in any event the building which PW1 is presently occupying and which was built in 1936 was never built by the original owner of the land (see *Mok Deng Chee v. Yap See Hoi & Ors.* [1981] 2 MLJ 321 and *Muniandy & Anor. v. Muhammad Abdul Kader & Ors.* [1989] 2 MLJ 416). The plaintiff's claim is therefore dismissed.

The defendants succeed in their counterclaim for an order for the demolition and removal of the said building on premises No. 5.B, Pekan Padang Sera, Jalan Kodiang, Padang Sera, Kedah and for an order of delivery of vacant possession of the portion of land known as Portion No. 469, comprised in 37680, Mukim of Kubang Pasu, Kedah.

There is no proof of damages suffered by the defendants as the claim for surveyors fees, architect fees, conversion and subdivision fees would in any event have been incurred by them in order to develop a housing estate on the said land and I disallow the claim for damages. Costs to the defendants.